UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. CIVIL 21981

BENJAMIN F. MARLOWE,

Appellant,

VS.

J. FRANK COAKLEY, Individually, and as DISTRICT ATTORNEY OF ALAMEDA COUNTY, STATE OF CALIFORNIA, LOWELL JENSEN, Individually, and as ASSISTANT DISTRICT ATTORNEY OF ALAMEDA COUNTY, STATE OF CALIFORNIA, C. HERBERT, Individually, and as INSPECTOR for the DISTRICT ATTORNEY'S OFFICE, ALAMEDA COUNTY, STATE OF CALIFORNIA, THE STATE OF CALIFORNIA, THE PEOPLE OF THE STATE OF CALIFORNIA, THE COUNTY OF ALAMEDA, FIRST, SECOND, THIRD, FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH, NINTH, and TENTH DOES, and XYZ COMPANY, INCORPORATED,

Appellee.

APPELLANT'S OPENING BRIEF

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TOPICAL INDEX

CITATIONS

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APPELLEES

STATEMENT OF FACTS

The essence of Appellant's complaint against the defendant-Respondents is that the defendants willfully and deliberately and knowingly used perjured testimony before the Grand Jury of Alameda County for the purpose of obtaining an indictment against Plaintiff-Appellant, and that said Respondents willfully and deliberately suppressed evidence within their knowledge in order to obtain said indictment. Appellant further charge defendants with misuse of the office

of District Attorney and that the said District Attorney of Alameda County, under color of office, abused the judicial process by use of perjured testimony and suppression of evidence; that said District Attorney was motivated by vindictiveness and a long-standing grudge against Appellant, which hostility is common knowledge in Alameda County; that Appellant was denied due process of law in that Appellant was denied a speedy trial and was not accorded equal rights and protection under the 5th and 14th Amendments of the Constitution of the United States; that all of the Respondents did conspire and act in collusion; the said Respondents filed a Motion of Dismissal of said complaint on the ground that the said Respondents were clothed with absolute immunity; the motion to dismiss was granted without comment or opinion.

ARGUMENT

WHETHER OR NOT THE DISTRICT ATTORNEY IS CLOTHED WITH ABSOLUTE IMMUNITY

Although the complaint as filed in the U.S. District Court contains a number of issues, all of which issues are incorporated herein by reference, the principle issue is whether or not a District Attorney is clothed with absolute immunity, since this appears to be the basis for the dismissal of the complaint.

To adopt the proposition that a District Attorney, as a Prosecutor, is clothed with absolute immunity is to

espouse the despotic and tyrannical philosophy condemmed by Patrick Henry in his famous and long remembered speech denouncing the tyranny of England in the days before the Revolutionary War. To declare that a Prosecutor can act with absolute immunity is to forget the tyranny, the despotism and oppression which brought King John of England to Runnymede and which gave birth to the Magna Carta, as well as the Bill of Rights of our own Constitution.

The Appellate Courts of the State of California have long ago enunciated the principles that prosecuting attorneys should do their duty faithfully but no more. They should never act as employed counsel nor take advantage of temporary public excitement against the prisoner, or of any prejudice against him arising from any cause whatever. People vs. Butler, 8 C 453. In People vs. Pang Sui Lin, 15 CA 260, 114 P 582, the court declared that a fair trial for the defendant should invite and receive from the District Attorney the same solicitous consideration as the conviction of the guilty, and it is as much his duty to safeguard the defendant's constitutional rights as to seek a conviction.

The Respondents make no pretense that said Respondents were merely faithfully performing their duty "but no more" or that said Respondents in the pursuit of their duty safeguarded the Appellant's constitutional rights. The very conduct of Respondents appears to be

that said Respondents are free to use perjury at will to obtain indictments even though it may be solely for the purpose of revenge and then claim absolute immunity by hiding behind the skirts of the law claiming sanctuary by virtue of their office. This is the obvious inference to be drawn from their attitude as reflected in their arguments. In determining whether plaintiff's complaint stated a cause of action plaintiff's allegations must be accepted as true. MILLER vs. GLASS 44 C2d 359, 282 P2d 501. Plaintiff's complaint is clear and unmistakable in its allegations that the Respondents knowingly used perjury and knowingly and deliberately suppressed testimony for the sole purpose of obtaining an indictment against appellant. Paragraph IX of the complaint CT p. 10, lines 4 - 12.

To borrow a phrase from Justice Hand, it would indeed "be monstrous" to support the proposition that a District Attorney can knowingly use perjury to obtain an indictment and then claim immunity from civil liability. This concept cannot be supported or justified in logic, or reason, nor can any authority be found for the same in the Constitution, statutory, or case law. Respondents have attempted to twist and distort the words of Judge Learned Hand to suit their purpose. It will be noticed that Judge Hand spoke of "honest mistakes". He did not even remotely intend to support the doctrine that a District Attorney can willfully and deliberately use perjury to obtain an

indictment and then claim immunity. One who is acting in the public good need not nor is expected to resort to suppression of testimony. Respondents also rely on Tenney vs. Brandhove, Brief 41 US 367 (1951), Agnew vs. Moody, 330 F2d 868 (9th Circuit 1964). Each of these cases are clearly distinguishable on its facts from the case at bar. The case cited by Respondents to wit Robichard vs. Ronan, 351 F2d 533 (9th Circuit 1965) enunciated, among others, the principle "even a prosecuting attorney may not be immune if he goes beyond the normal functions of a prosecuting attorney and engages in police work." It can scarcely be contended that the normal functions of a prosecuting attorney is to willfully and deliberately use perjury to obtain an indictment or to willfully and deliberately suppress testimony for the sole purpose of misleading a Grand Jury in order that he may obtain an indictment.

This court in Cohen vs. Norris, 300 F2d 24 clearly enunciated the following principles which are contrary to the contentions of the appellees.

1. The 4th Amendment of the Constitution of the United States guarantees the right of an individual to be secure against unreasonable arrests as well as against unreasonable search and seizure and a civil cause of action for conspiracy may be based on the statute as to civil actions for deprivations of civil rights 42 USCA 1983.

2. Under "color of state statute" within statute

providing that a person, who, under color of any statute of a state, deprives another of his constitutional rights shall be liable, pertains to conduct of actor clothed with authority of state while purporting to act thereunder whether the conduct complained of was authorized or even proscribed by state law, 42 USCA 1983.

3. No local rule of immunity unassociated with generally recognized common law immunity can stand as a defense in Civil Rights Act case 42, USCA 1983. The conduct of appellees is not associated with any generally recognized common law immunity.

4. In order to state a claim under 42, USCA 1983, facts must be alleged which show a defendant: (1) while acting under color of any statute, ordnance, regulation, custom, or usage of any state or territory; (2) subjects or causes to be subjected any person within the jurisdiction of the United States to the deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States. The complaint before this court clearly complies with this section. Citing RENNIE & LAUGHLEN INC. vs. CHRYSLER CROP. Cir. 242, 242, F.2d 208, 212 - 213, this court again announced that a motion to dismiss is viewed with disfavor in the Federal Courts.

It will be noted that the Respondents advance the same reasons urged by the Appellees in TENNEY vs. BRANDHOVE 31 US 367 and HOFFMAN vs. HOLDEN 268 F.2d 280 in which the

complaint had been dismissed as in the case before this court, namely that it should be held that the action was properly dismissed as the action in question were performed by them as police officers in the exercise of a discretionary function under which they have immunity from liability. By virtue of the provisions of the Civil Rights Act, this argument was rejected and both cases were distinguished on its facts in Cohen vs. Norris 300 F2d 24. Under the case of Monroe vs. Pape (1961) 365 US 167, 81 S CT 473, 5 L Ed 2492 (decided February 20, 1961) a commencement and prosecution of unfounded criminal prosecution under the facts set forth in appellant's complaint constitute not only malicious prosecution under the law, but violation of civil rights as well.

The Respondent also relies on California Government Code Section 821.6. It is contended by the Appellant that the abuse of process as set forth in his complaint does not come within the described immunity set forth in said government code section. Crews vs. Mays (1913) 165 C 493, 132 P 1032; Pimentel vs. Houk (1951) 101 CA 2d 884, 226 P2d 739 which cites 1 Ruling Case Law 103 in discussing abuse of process; Tranchina vs. Arcinas (1947) 78 CA 2d 522, 178 P2d; Restatement, Torts 682; 2 Witkin, Summary of California Law 1272 - 1274 (7th ed. 1960). The fact that the Federal Tort Claims Act expressly creates separate immunities for "malicious prosecution" and "abuse of process" supports the

view that 821.6 may not apply to cases not clearly in the malicious prosecution classification. 28 USC 2680(h). Since the provisions of the Federal Tort Claim Act were well known to the Law Revision Commission, limitations of California immunity to malicious prosecution apparently was deliberate.

PROCEEDINGS BEFORE GRAND JURY

The appellees failed to make a distinction between the conduct of a preliminary examination and proceedings before a Grand Jury. A preliminary examination is held after an individual has been charged with a crime to determine whether or not said accused shall be held to answer for the purpose of trial in the Superior Court. Presumably an investigation has been conducted and sufficient evidence obtained to warrant a complaint against a defendant, pursuant to which he is arrested and brought before a magistrate. Upon a plea of not guilty, the matter is then set for a preliminary examination. A Grand Jury is, on the other hand, inherently a body of inquisition empowered to make FULL and DILIGENT inquiry into public offenses triable within the county. IRWIN vs. MURPHY 129 CA 713, 19 P2d 292. In making such inquiry it is its duty to protect the citizen against unfounded accusation. In re TYLER 64 C 4341 P 884. It will be noted that a FULL and DILIGENT inquiry into public offenses must be made. It is a violation of the oath administered to the Grand Jury for the Grand Jury to fail to make a full and diligent inquiry and it is even more

reprehensible to withhold information which is extremely relevant and material, in order that an indictment may be obtained. Because of the conduct of the appellees, not only did the Grand Jury not make a full and diligent inquiry in the case of the appellant, but witnesses were brought before the Grand Jury who had full knowledge of all the facts. The appellees flagrantly abused their authority and misused their office by willfully, deliberately and systematically concealing from said Grand Jury facts known to said witnesses which pointed to appellants innocence and which would clearly negated any criminal intent on the part of the appellant. This abuse was compounded by the use of one Margaret Burke, who was incompetant as a witness, to establish a corpus delicti by the use of perjured testimony. In truth and in fact the appellees were guilty of subornation of perjury, suppression of testimony and obstruction of the proper administration of justice each of which is a felony under the laws of the state of California. The tactics used by appellees were willfully designed to mislead the Grand Jury by hampering and curtailing a full and diligent inquiry. The appearances of the District Attorney before the Grand Jury is not in a quasi-judicial capacity but in an investigative capacity. Theoretically, said District Attorney should be impartial. One of his duties is to see that a fair and impartial investigation is conducted. If there is any question about the influence the District Attorney wields over the Grand Jury, the following

quotations are offered from people who served on the Grand Jury of Alameda County in the year 1965 and 1966: "All directions come from the District Attorney. He and his assistants definitely lead the group." This particular juror declared that the remaining jurors "felt like stooges for months." When the said Grand Jury requested to speak to the Judge, the said jurors were allegedly told "we were told that he was too busy and that the District Attorney would go see him." A member of the 1966 Grand Jury felt they were "puppets or rubber stamps of the District Attorney." Any person who is investigated by the Grand Jury is at the complete mercy of the District Attorney. It is contended that the role of the District Attorney before a Grand Jury is an investigative role and not that of a quasi-judicial officer and that said appellees are not immune from civil liability. In ROBICHARD vs. RONAN 351 F.2d 533, the court stated:

> "We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity-integral relationship between his acts and the judicial process - ceases to exist. If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if, in so acting, he has deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and laws? See Monroe v Pape, supra, 365 U.S. at 187, 81 S.Ct. 473; see also Schneider v. Shepherd, 192 Mich. 82, 158 N.W. 182, L.R.A.1916F, 399 (1916), cited in Yaselli, 12 F.2d at 405. To us, it seems neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.
>
> The prosecuting attorney may have numerous

roles. See Barrett, Police Practices and the Law-From Arrest to Charge, 50 Calif.L.Rev. 11, 16-24 (1962). The distinction between the roles may be significantly controlling, for as our court quite recently emphasized, 'prosecutors are not immune from suit under the Act simply as a matter of status wholly without regard to the nature of their conduct.' Corsican Productions v. Pitchess, 338 F.2d 441 (9th Cir. 1964). In that case, we cited, with approval, Lewis v. Brautigan, 227 F.2d 124, 55 A.L.R.2d 505 (5th Cir. 1955). In the Lewis case, a state's attorney, an official prosecutor, was sued, not for acts done in the course of his quasi-judicial role, but rather for acts done in his investigative role."

The District Attorney may, at all times, appear before the Grand Jury for the purpose of giving information and advice on matters cognizable by them and may interrogate witnesses whenever he thinks it necessary. California Penal Code # 925. It will be noted that the District Attorney does not appear as a quasi-judicial officer. He appears only in an investigative capacity to assist the Grand Jury in its investigation. Since the Grand Jury acts on matters brought before them by the District Attorney, the concealment of material facts can and does result in an indictment where an indictment would not have been found had the concealed facts been disclosed. A Grand Jury investigation is not a criminal proceeding. In Re McDonough 9 C2d 90, 68 P2d 9021.

In an effort to find out why the Grand Jury system is the focus of controversy in California, a survey was made requiring 1,500 miles of travel and interviewed with District Attorneys, Judges and Grand Jury Foremen. They

are the men who presumably must live with and make the system work. According to an article written by Mr. Paul James, Assistant City Editor of the San Diego Union for which he won an award from the State Bar of California, "the Grand Jury passed and circulated a resolution saying state law should be changed so juries have their own investigators, independant of district attorneys." The jurors, through their spokesman, presented a strong case, saying the quality of investigators would safeguard the privacy of individuals. They said if an investigator is answerable only to the Grand Jury, the jurors would have firmer control than under the present system of using district attorney's investigators.

THE CIVIL RIGHTS ACT

The United States Supreme Court in MONROE, et al, vs. PAPE 365 U.S. 167 reviewed at great length, including the legislative history, the rights and protection afforded to an individual under R.S. # 1979, 42 USC # 1983 and the construction to be placed on the provisions thereof which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

It will be noted that the said section does not exclude district attorneys as alleged quasi-judicial officers. The United States Supreme Court declared that one who reads said statutes in their entirety, says that the present section had three aims: First, it might override certain kinds of state law. Second, it provided a remedy where state law was inadequate. Third, to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice.

On page 184, the said United States Court, in an opinion written by Mr. Justice (later Chief Justice) Stone ruled, "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." Although there was a dissenting opinion, the rule as to the meaning of "under color of" state law was not questioned. That view of the meaning of the words "under color of" was reaffirmed in SCREWS vs. UNITED STATES. The said court continued in its opinion on page 187. The Court declared:

> "If the results of our construction of 'under color of' law were as horrendous as now claimed, if they were as disruptive of our federal scheme as now urged, if they were such an unwarranted invasion of States' rights as pretended, surely the voice of the opposition would have been heard in those Committee reports. Their silence and the new uses to which 'under color of' law have recently been given, reinforce our conclusion that our prior decisions were correct on this matter of construction.

We conclude that the meaning given 'under color of' law in the CLASSIC case and in the SCREWS and WILLIAMS cases was the correct one; and we adhere to it.

In the SCREWS case, we dealt with a statute that imposed criminal penalties for acts 'willfully' done. We construed that word in its setting to mean the doing of an act with 'a specific intent to deprive a person of a federal right.' 325 U.S., at 103. We do not think that gloss should be placed on # 1979 which we have here. The word 'willfully' does not appear in # 1979. Moreover, # 1979 provides a civil remedy, while in the SCREWS case we dealt with a criminal law challenged on the ground of vagueness. Section 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

Justice Frankfurter stated in MONROE vs. PAPE as follows:

"To show such violations, petitioners invoke primarily the Amendment's Due Process Clause. The essence of their claim is that the police conduct here alleged offends those requirements of decency and fairness which, because they are 'implicit in the concept of ordered liberty,' are imposed by the Due Process Clause upon the States. PALKO vs. CONNECTICUT, 302 U.S. 319, 325. When we apply to their complaint that standard of a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' which has been the touchstone for this Court's enforcement of due process, the merit of this constitutional claim is evident."

In the case at bar, the conduct of the appellees, without any shadow of a doubt, offends the requirements of decency and fairness which are "implicit in the concept of ordered liberty," nor does the title of office, quasi-judicial or even judicial of itself, immunize the appellee from responsibility for unlawful actions which cannot be said to constitute an integral part of the judicial process.

ROBICHARD vs. RONAN 351 F.2d 533 (1965), pg. 537.

The first amended complaint of the appellant is based primarily on misuse of office and abuse of process in that, as alleged paragraph IX, "Under color and by misuse of the office of District Attorney of Alameda County, said J. Frank Coakley in collusion with the said Assistant District Attorney Lowell Jensen and Inspector C. Herbert, and others, knowingly and willfully presented to the Grand Jury on or about February 18, 1965, perjured testimony for the designed purpose of obtaining an indictment against plaintiff and willfully and by design did not present a full and true picture of all facts before said Grand Jury, which facts were available to and within the knowledge of said named officials." CT p. 10, ll 4-9. Paragraphs XI, CT 10, ll 19-32, XII, CT. 11, ll 1-8, and XV, CT. 11, ll 19-26 specifically set forth material facts known to the District Attorney which were concealed from the Grand Jury. Even a casual observation leads an unprejudiced mind to one conclusion that the withholding of said information was designed to mislead the Grand Jury and assure that the said Grand Jury would bring in an indictment. By this course of conduct, the appellees made certain that the integrity of the appellant would be forever besmirched and any political ambition stifled. It is a well accepted fact that even an acquittal will not remove the stigma of an indictment. Paragraph XVII, CT. 12, ll 4-8 clearly demonstrated that

appellee did not receive a speedy trial in violation of his constitutional rights as guaranteed by the 6th and 14th Amendments of the United States Constitution.

It is contended by the appellant that the appellees stripped themselves of any possible immunity by virtue of their conduct as hereinabove set forth that a cause of action has been stated against the said appellees and that this action should be remanded to the United States District Court for trial on its merits.

Respectively submitted,

Benjamin F. Marlowe
In Propria Persona

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Benjamin F. Marlowe